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No. 86-280

# In the Supreme Court of the United States

OCTOBER TERM, 1986

OUTBOARD MARINE CORPORATION, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether, under the facts of this case, the district court abused its discretion in granting dismissal without prejudice of an injunction action by the United States seeking cleanup of a hazardous waste site.

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 789 F.2d 497. The opinion of the district court (Pet. App. D1-D17) is reported at 104 F.R.D. 405.

## JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on April 22, 1986, and a petition for rehearing was denied on May 22, 1986 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on August 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case arises from efforts by the United States Environmental Protection Agency (EPA), to remedy polychlorinated biphenyl (PCB) contamination on and adjacent to property owned by petitioner Outboard Marine

Corporation at Waukegan, Illinois. PCBs are hazardous substances within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. (& Supp. II) 9601 *et seq.*[1] EPA contends that petitioner illegally discharged PCBs over a 20-year period from its facility adjacent to Waukegan Harbor, and that these PCBs came from industrial fluids sold by Monsanto Company (Pet. App. A3). EPA estimates that petitioner's unauthorized discharges released approximately 1.1 million pounds of PCBs (*ibid.*). Because of the resulting contamination, this site was ranked 82d of 540 sites on the National Priority List of hazardous waste sites requiring cleanup action,[2] and designated by the State of Illinois as its number one priority site (*id.* at A5).

1. EPA initially sought to remedy this contamination by requiring petitioner itself to clean up the site. On March 17, 1978, the United States filed a civil action against petitioner seeking injunctive relief under the Refuse Act, 33 U.S.C. 407, the Clean Water Act, 33 U.S.C. (& Supp. II) 1251 *et seq.*, and the federal common law of nuisance, and seeking civil penalties under the Clean Water Act (Pet.

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[1] Section 101(14) of CERCLA, 42 U.S.C. 9601(14), defines hazardous substances to include substances regulated under several other statutes, and includes toxic pollutants listed and substances designated under Sections 307(a), 311(b)(2)(A) of the Clean Water Act, 33 U.S.C. 1317(a), 1321(b)(2)(A). PCBs are both listed as toxic pollutants under Section 307(a) (see 40 C.F.R. 401.15), and designated as hazardous substances under Section 311, 33 U.S.C. (& Supp. II) 1321 (see 40 C.F.R. 116.4). PCBs have also been designated as hazardous substances under Section 102 of CERCLA, 42 U.S.C. 9602 (see 40 C.F.R. 302.4).

[2] The National Priority List was prepared pursuant to Section 105(8) of CERCLA, 42 U.S.C. 9605(8), which requires that the ranking reflect the degree of "relative risk or danger to public health or welfare or the environment." The List appears as Appendix B to the regulations implementing CERCLA, 40 C.F.R. Pt. 300.

App. A3). Petitioner filed a third-party action against Monsanto, seeking contribution and indemnity (*ibid.*), and the United States subsequently asserted Refuse Act, federal common law of nuisance and product liability claims directly against Monsanto (Pet. App. A3). CERCLA was enacted on December 11, 1980; on February 2, 1982, the United States filed its final amended complaint, adding an injunctive relief count against petitioner under Section 106 of CERCLA, 42 U.S.C. 9606, to require petitioner to clean up the PCB contamination (Pet. App. A4).[3]

On May 24, 1982, the court granted petitioner's and Monsanto's motions to dismiss the federal common law of nuisance claims (see *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981); Pet. App. A4).[4] In October 1982, however, the court denied petitioner's motions to dismiss the Refuse Act, Clean Water Act and CERCLA claims against it, holding that these statutes authorize the United States to seek mandatory injunctive relief requiring private parties to conduct hazardous waste cleanups (Pet. App. A5).

In response to petitioner's November 1982 motion to reconsider, the court stated, in recommending that the parties consider settlement, that it had " 'about a sixty percent comfort in my prior opinion,' "[5] and set the motion for oral argument in March 1983 (Pet. App. A5).

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[3] Section 106(a) of CERCLA, 42 U.S.C. 9606(a), authorizes EPA, when it determines that there "may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility," to file an action in federal court "to secure such relief as may be necessary to abate such danger or threat."

[4] The court subsequently dismissed the Refuse Act and product liability claims against Monsanto, eliminating all direct claims against Monsanto (Pet. App. A4).

[5] Petitioner states (Pet. 5) that the district court "urged the government to settle the case." The court, in fact, advised all parties to consider settlement, and suggested that they take into account the uncer-

2. In the meantime, EPA compiled its initial National Priority List on December 30, 1982, listing those hazardous waste sites requiring prompt remedial action (Pet. App. A5; see 47 Fed. Reg. 58476 (1982)). The proposed List ranked the Waukegan Harbor site as 82d of 540 sites, and the State of Illinois designated the site as its highest priority Superfund site.[6] Immediately after issuance of the List, the United States reassessed its efforts to compel petitioner to clean up the Waukegan site, and concluded that because of the remaining discovery, a lengthy trial, and anticipated appeals, continued litigation " 'will likely delay the implementation of remedial work at [petitioner's] site and in Waukegan [H]arbor for an additional three to four years' " (Pet. App. A6 (quoting R.A. 642, at 4)). The government accordingly concluded that the most expeditious means of addressing the serious PCB contamination problem at the site would be for EPA to conduct its own remedial action under Section 104(a)(1) of CERCLA, 42 U.S.C. 9604(a)(1),[7] followed by an action against the

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tainty of the legal issues (R.A. 713, at 6-7, 12-13). (Citations to documents in the record on appeal in the court of appeals are cited herein as "R.A." followed by the number of the document in the clerk's List of Documents.) —

[6] The National Priority List promulgated September 8, 1983, also ranked the Waukegan site as 82d. 48 Fed. Reg. 40658. Following recent revisions to the List, the Waukegan site ranks 86th of 703 sites. 51 Fed. Reg. 21054, 21080 (1986).

[7] That Section, which is the principal response section of CERCLA, provides in relevant part that:

> Whenever (A) any hazardous substance is released or there is a substantial threat of such release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, [EPA] is authorized to act, consistent with the national contingency plan, to remove * * * and provide for remedial action relating to such hazardous substance, pollutant, or contaminant

responsible parties under Section 107, 42 U.S.C. (& Supp. II) 9607, to recover cleanup costs (Pet. App. A6).[8] The United States advised the court that (R.A. 642, at 1-2):

> [T]he public interest will best be served by initiating immediately a feasibility study to examine potential alternative remedial programs for the [petitioner's] Waukegan site and to recommend a remedial alternative consistent with statutory requirements, and then to undertake an appropriate remedy at the site.

The United States moved on March 22, 1983, to stay the injunctive action pending EPA administrative proceedings under CERCLA to determine the appropriate Section 104, 42 U.S.C. 9604, cleanup remedy (R.A. 642). Petitioner and Monsanto initially opposed the stay (Pet. App. D4); Monsanto filed a motion to "bifurcate," requesting trial prior to any government cleanup under Section 104, but only on the issues of: (1) whether the PCBs at the site pose a risk of "imminent harm," and (2) "[w]hat remedy, if any, is appropriate under the circumstances" (Pet. App. D4; R.A. 672, at 2). On July 26, 1983, at the parties' suggestion and by their agreement, however, the court stayed consideration of all motions until after EPA determined the appropriate cleanup remedy (Pet. App. A6, D4).

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* * * or take any other response measure consistent with the national contingency plan * * * unless [EPA] determines that such removal and remedial action will be done properly by the owner or operator * * *.

[8] Section 107(a)(4)(A), 42 U.S.C. 9607(a)(4)(A), provides that those parties responsible for the presence of hazardous waste shall be liable for "all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan." The national contingency plan is described in Section 105, 42 U.S.C. 9605, and requires, inter alia, that EPA remedial actions be cost-effective.

EPA thereafter conducted various studies pursuant to statutory requirements, held two public hearings and provided two public comment periods (Pet. App. A6, D4).[9] EPA issued its final Record of Decision (ROD) on May 15, 1984. While the ROD included a possible $75 million remedy, EPA selected a $21.3 million remedial action to conserve federal cleanup funds (*id.* at D11).[10] That remedy provides that sediments containing the highest concentrations of PCBs will be transported off-site to a licensed chemical waste landfill (*id.* at A6-A7). Other contaminated sediments will be excavated, dried out, and buried in an on-site containment cell (*ibid.*).

3. Within a week of the issuance of the ROD, the United States moved (under Fed. R. Civ. P. 41(a)(2)) for voluntary dismissal, without prejudice, of the remaining counts of its injunctive action based on the determination "that the best interests of the public health would be served by implementing the [selected] remedy rather than by seeking injunctive relief in this lawsuit" (R.A. 676, at 1; Pet. App. A7). The United States concluded that, in light of the protracted trial and appeal proceedings to be expected in the instant case, the "public health, welfare, and environment are best protected by proceeding on this expeditious administrative track" (R.A. 676, at 14).

In opposing voluntary dismissal without prejudice, petitioner suggested that the court hold in abeyance its November 1982 motion to reconsider the court's denial of

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[9] Petitioner and Monsanto attended the hearings and submitted comments (Pet. App. A6 n.6).

[10] Section 104(c)(4) of CERCLA, 42 U.S.C. 9604(c)(4), requires EPA to select "appropriate remedial actions * * * which provide for that cost-effective response which provides a balance between the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the [Superfund] * * * to respond to other sites which present or may present a threat to public health or welfare or the environment."

dismissal (see page 3, *supra*), and instead hold trial as requested in Monsanto's "bifurcated" trial motion (R.A. 671, at 29). Petitioner contended that this "would permit a trial on all the troublesome questions raised by the R.O.D.," and allow the government to determine now whether it would be "unable to recover the costs of the R.O.D. remedy" (*ibid.*).

The district court on August 30, 1984, tentatively granted the United States' motion for a voluntarily dismissal. It stated, however, that the dismissal would be "with prejudice generally," but without prejudice to a later cost recovery suit (Pet. App. D6-D7). The court found that the litigation had been costly, and while the court could not predict how it would rule on petitioner's motion to reconsider its refusal to dismiss the action, there was at least a "serious possibility" that it would grant the motion. Thus, to protect defendants against "even a slim possibility that the United States might change its plans again,"[11] the court initially granted dismissal with prejudice (*ibid.*). The court noted, however, that it "assume[d] that dismissal with prejudice will bar reinstatement of [the dismissed counts] but will not bar a future cost-recovery suit, and the court does not understand [petitioner] to argue otherwise" (*id.* at D7). Nevertheless, "[l]est there be any misunderstanding," the court stated specifically that dismissal was "without prejudice to a future cost-recovery suit" (*ibid.*). The court found that petitioner's opposition to dismissal was "plainly * * * an attempt to obtain judicial review of the ROD before cleanup is undertaken," which is not authorized by CERCLA (*id.* at D8). Similarly, petitioner's suggestion to "hold" its motion to re-

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[11] The United States had contended that dismissal with prejudice was unnecessary because the statute of limitations had run on its claim for civil penalties under the Clean Water Act, and its claims for injunctive relief would be mooted by the proposed government cleanup (Pet. App. D6).

consider, pending trial of the "bifurcated" issues of harm and remedy, constituted "part of [petitioner's] effort to jockey the present lawsuit into a posture in which it might serve as a vehicle for premature judicial review of the ROD" (*id.* at D11).

The United States accepted the conditions of dismissal (R.A. 713, at 6), but petitioner argued that dismissal with prejudice of the injunctive claims raised a res judicata bar to a future cost recovery action as a matter of law (Pet. App. A8). To preserve the intent of the district court while protecting petitioner and Monsanto from repetitive litigation, the United States on December 21, 1984, suggested that the court dismiss the case without prejudice, but subject to a covenant not to sue precluding reinstatement of the pending claims for injunctive relief and penalties asserted in the final amended complaint (*id.* at A9). The court adopted this suggestion and dismissed the case on March 6, 1985 (*ibid.*). The covenant not to sue, executed by the United States on April 23, 1985, states (U.S. C.A. App. A, at 2), that, because EPA intends to undertake cleanup itself, the United States:

> covenants not to sue [petitioner] for injunctive relief or civil penalties pursuant to Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407; Section 309(b) and (d) of the Federal Water Pollution Control Act, 33 U.S.C. § 1319(b) and (d); and Section 106 of the CERCLA, 42 U.S.C. § 9606, or any other civil claims with respect to the abatement of PCB contamination in the Waukegan Harbor area which plaintiff might have asserted on behalf of USEPA in this litigation based on the same facts as those alleged in the Second Amended Complaint and now known to plaintiff.

The covenant reserves the right of the United States "to initiate and maintain an action to recover from any person all costs incurred relating to the USEPA-funded response

action to clean up PCB contamination in and around [petitioner's] Waukegan Harbor facility" (U.S. C.A. App. A, at 3).

4. The court of appeals held that the district court's dismissal without prejudice, conditioned on a convenant precluding the United States from further asserting the dismissed claims, was not an abuse of discretion. The court concluded (Pet. App. A11):

> From our review of the record we are convinced that balancing the delay pending the years of anticipated litigation over injunctive relief against the overwhelming interest of the government in protecting the environment from further irreparable damage to the water and marine life and in protecting citizens from the potential harmful effects of PCB * * * justifies the government's decision to proceed with the immediate removal of the PCB sediments and possibly sue at a later date for the removal costs.

The court also evaluated petitioner's claim that it might have obtained a favorable ruling on its motion to reconsider the denial of its motion to dismiss as "at best highly speculative and conjectural" (Pet. App. A14). The covenant not to sue in any case prevented the government from reasserting the same claims, so that petitioner has "in effect, achieved [its] purpose in having the injunctive relief claims dismissed" (*id.* at A15). Finally, petitioner suffered no legal prejudice with respect to its litigation expenses because it "will not again be forced to litigate the claims seeking injunctive relief," its work product was of potential use in any subsequent cost recovery suit, and in any event, it had been awarded some of its costs (*id.* at A18-A19).[12]

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[12] Following the district court's August 30, 1986, dismissal determination, EPA requested access from petitioner to its Waukegan Harbor property to obtain information for final design of the remedy.

## ARGUMENT

Petitioner seeks review of a decision holding that the district court did not abuse its discretion in granting a dismissal which, by express covenant, prohibits further litigation for injunctive relief or civil penalties under the dismissed claims. The decision turns on the particular facts of this case, and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is unwarranted.

1. Petitioner asserts (Pet. 9) that the case "provides an opportunity for this Court to set guidelines" for Rule 41(a)(2) dismissals, and invites the Court (Pet. 19) to establish "workable standards" for such dismissals, without suggesting any such standards. We submit that there is no need—and certainly no occasion here—to establish any more rigid standards than those currently applicable, which recognize the broad discretion of the district court.[13] Although petitioner contends (*id.* at 11) that lower courts have reached "widely divergent results

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After petitioner refused voluntary access, EPA on February 13, 1985, obtained a warrant granting access for this limited purpose. Petitioner refused to honor the warrant, and sued to enjoin EPA from executing it. The United States District Court for the Northern District of Illinois denied petitioner's motion for preliminary injunction on April 30, 1985. The court of appeals reversed, holding that Section 104 of CERCLA does not authorize entry to private property to design a remedy. *Outboard Marine Corp.* v. *Thomas,* 773 F.2d 883 (7th Cir. 1985), cert. granted, No. 85-1753 (Oct. 6, 1986). The issues in that case are unrelated to the issue here, and petitioner does not contend otherwise.

[13] The granting or denial of a Rule 41(a)(2) motion for voluntary dismissal is "within the sound discretion of the district court," and will be reversed only for abuse of discretion. *Tyco Laboratories, Inc.* v. *Koppers Co.,* 627 F.2d 54, 56 (7th Cir. 1980); *Stern* v. *Barnett,* 452 F.2d 211, 213 (7th Cir. 1971); *Puerto Rico Maritime Shipping Authority* v. *Leith,* 668 F.2d 46, 50 (1st Cir. 1981); *Kern* v. *TXO Production Corp.,* 738 F.2d 968, 971 (8th Cir. 1984); 9 C. Wright & A.

under very similar conditions" in ruling on Rule 41(a)(2) dismissals, the decisions cited (Pet. 11-13) reflect nothing more than that the results reached depend on the widely varying circumstances present in the various cases. The district court is in the best position to evaluate those circumstances, as the prevailing standard recognizes. In light of the particular circumstances of this case, the court of appeals correctly concluded that the district court acted well within its discretion in granting this conditional voluntary dismissal (Pet. App. A10-A20).[14]

a. In contrast to every case relied on by petitioner (Pet. 11-13 & n.6), the United States here executed a covenant not to sue, which fully protects petitioner's in-

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Miller, *Federal Practice and Procedure: Civil* § 2364, at 161-163 (1971). Courts should grant dismissal unless the defendant will suffer some " 'plain legal prejudice.' " *Stern* v. *Barnett*, 452 F.2d at 213; *LeCompte* v. *Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); 9 C. Wright & A. Miller, *supra*, § 2364 at 165. In deciding whether there is such prejudice, courts consider such factors as "defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and the fact that a motion for summary judgment has been filed." *Pace* v. *Southern Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969). These factors are "not equivalent to a mandate that each and every such factor be resolved in favor of the moving party before dismissal is appropriate," but constitute "a guide for the trial judge, in whom the discretion ultimately rests." *Tyco Laboratories, Inc.* v. *Koppers Co.*, 627 F.2d at 56.

[14] Voluntary dismissal will be denied only where there is plain prejudice which "cannot be 'avoided by imposing terms and conditions on the dismissal.' " *Victory Beauty Supply, Inc.* v. *La Maur, Inc.*, 98 F.R.D. 306, 307 (N.D. Ill. 1983) (quoting 9 C. Wright & A. Miller, *supra*, § 2364, at 165, 172). The court is not limited to requiring payment of costs, expenses and fees, but may condition dismissal on other terms designed to eliminate prejudice, including a covenant not to sue. *LeCompte* v. *Mr. Chip, Inc.*, 528 F.2d at 603, relying on *Goldlawr, Inc.* v. *Shubert*, 32 F.R.D. 467, 469-470 (S.D. N.Y. 1962).

terests.[15] Ignoring the covenant, petitioner incorrectly claims (*id.* at 9) that the dismissal here allows "the very same matter to be re-filed at a later date." As the court of appeals found, the United States "is prevented from again bringing another action seeking the same injunctive relief and civil penalties in this fact situation. [Petitioner has], in effect, achieved [its] purpose in having the injunctive relief claims dismissed" (Pet. App. A15).

b. Moreover, none of the cases cited by petitioner involves the critical public considerations present here. Petitioner contends that the United States offered insufficient justification for the dismissal, and that the court of appeals "uncritically accepted" the government's reasons (Pet. 14-15). The United States, however, provided a thorough and explicit justification for dismissal, based directly on EPA's responsibility under CERCLA to remedy hazardous waste contamination.[16] After a full review of this extensive record (Pet. App. A10-A13), the court of appeals concluded (*id.* at A14) that "the government has offered a legitimate reason" for its decision that the public interest would be better served by undertaking its own cleanup action, rather than continuing legal efforts

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[15] For example, in *Ferguson* v. *Eakle*, 492 F.2d 26, 29 (3d Cir. 1974), on which petitioner relies (Pet. 11), defendants would have been required to defend against the same action in state court, after completion of pretrial and discovery in the federal action; in *Paturzo* v. *Home Life Insurance Co.*, 503 F.2d 333, 335 (4th Cir. 1974) (Pet. 12), plaintiff sought dismissal on the morning of trial of one portion of its claim, for which it had waived a jury trial, so that it could litigate that aspect in a separate class action filed that same morning requesting a jury.

[16] Significantly, although (as the court of appeals noted (Pet. App. A13)) petitioner has "fought the government every possible inch of the way for over six years in court," its only substantive defense has been to contest the extent of the hazard posed by PCBs. It has not seriously disputed its responsibility for the contamination involved.

to compel petitioner to clean up the site.[17] Rule 41(a)(2) certainly is no bar to EPA's determining the most effective use of the statutory tools at its command for the cleanup of hazardous sites, and revising its approach where circumstances warrant. Here, the United States properly elected to seek injunctive relief in the first instance to preserve its limited cleanup funds for other sites (see Pet. App. A12), and sought to draw on CERCLA funds only after the Waukegan site was identified on the National Priority List as among the worst in the country. Rule 41(a)(2) allows voluntary dismissals even where plaintiffs seek nothing more than a more convenient forum or a tactical advantage, *Puerto Rico Maritime Shipping Authority* v. *Leith,* 668 F.2d at 50; *Hamilton* v. *Firestone Tire & Rubber Co.,* 679 F.2d 143, 145 (9th Cir. 1982). *A fortiori,* the serious substantive reasons advanced here justify such a dismissal. As the court of appeals concluded, EPA

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[17] Petitioner contends (Pet. 14) that the United States did not need to dismiss because it "could have implemented a cleanup while simultaneously proceeding against OMC for its cleanup costs by amending its complaint to seek those costs under Superfund § 107(a), 42 U.S.C. § 9607(a)." The suggestion that the government should have pursued both its own cleanup, and injunctive relief requiring petitioner to clean up at the same time contemplates a legal and administrative nightmare that Congress could not have intended. (Of course, petitioner continues to oppose EPA's cleanup efforts as well. See note 12, *supra.*). Furthermore, while the United States can initiate a cost recovery action under CERCLA once some recoverable costs have been incurred, CERCLA does not, as petitioner suggests (Pet. 14), compel EPA to file an immediate cost recovery action as soon as any recoverable costs have been incurred. It certainly does not require such a cost recovery effort as part of a Section 106 injunction action. See *United States* v. *Northeastern Pharmaceutical & Chemical Co.,* 579 F. Supp. 823, 826 (W.D. Mo. 1984), appeal pending, No. 84-1837 (8th Cir.)). The timing of cost recovery actions, and the determination of parties from whom costs are to be sought, is left by CERCLA to EPA, which has the expertise to make such response and cost recovery decisions.

"possessed the discretion to decide that the gravity of the problem (as revealed by the NPL and Illinois ranking given the Waukegan harbor site) necessitated immediate action and that it would be in the public interest to expend government resources to remove the PCB sediment rather than wait for the endless litigation of this case to take its natural course" (Pet. App. A13).

2. Petitioner's claims of prejudice are without foundation. Petitioner contends (Pet. 15-16) that it was deprived of a ruling on its motion to reconsider the refusal to dismiss or, alternatively, of a trial. The dismissal motion, however, involved precisely those claims covered by the covenant not to sue. Thus, while petitioner did not obtain the ruling it sought, the covenant, as the court of appeals found (Pet. App. A15), served the identical purpose, *i.e.*, protection from future litigation of the counts involved. *LeCompte* v. *Mr. Chip, Inc.*, 528 F.2d at 604.[18] In any event, Rule 41(a)(2) simply does not entitle defendants to a ruling on a dispositive motion, or to a trial. *Puerto Rico Maritime Shipping Authority* v. *Leith*, 668 F.2d at 48-49; *Kern* v. *TXO Production Corp.*, 738 F.2d at 971. Thus, in order to defeat a Rule 41(a)(2) motion, the defendant must show some plain legal prejudice " 'other than the mere prospect of a second lawsuit.' " *Stern* v. *Barnett*, 452 F.2d at 213. The " 'missed opportunity for a legal ruling is not

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[18] Petitioner's claim of prejudical loss of "expense and effort in trial preparation" (Pet. 17) similarly ignores the preclusive impact of the covenant not to sue. As the court of appeals found, petitioner "will not again be forced to litigate the claims seeking injunctive relief," and will bear no duplicative expenses or effort as to those claims (Pet. App. A18). In any case, the district court awarded petitioner $68,893 in costs (*id.* at A18 & n.12). Furthermore, as the court of appeals held, "appellants' work product might very well be useful if and when the government brings its action for recovery of removal costs" (*id.* at A19). See *Puerto Rico Maritime Shipping Authority* v. *Leith*, 668 F.2d at 50.

sufficient to warrant the denial of a motion for voluntary dismissal.' " *Spencer* v. *Moore Business Forms, Inc.*, 87 F.R.D. 118, 119 (N.D. Ga. 1980).

Petitioner contends (Pet. 16) that the government sought to avoid a ruling or trial because of the weakness of its case. While petitioner cites the district court's statement that it had a " 'sixty percent comfort' " in its prior rulings, that is scarcely a confession of error; moreover, the court of appeals concluded "from our review of the record, including the district court's comments, we certainly are far from convinced that the appellants would have obtained a favorable ruling from the district court" (Pet. App. A15). Petitioner's reliance (Pet. 16) on the government's 1982 responses to requests for admission is similarly misplaced. The government stated only that it had no scientific proof at that time that any specific individual had been harmed. As the court of appeals noted, the government "did not admit that the PCB would not present a potential threat to human beings in the future; nor did the government admit that the PCB in the harbor would not pose a risk of future significant environmental damage to the environs of the harbor, Lake Michigan and the fish and aquatic life in that area" (Pet. App. A4 (footnote omitted)).[19]

Despite petitioner's claim in this Court of prejudice from the loss of a timely ruling, petitioner itself suggested that its motion to reconsider be placed in abeyance so the district court could hold trial on the "bifurcated" issues of harm and remedy (Pet. App. D11). See pages 6-7, *supra*. Thus, petitioner's real objection is to the loss of an opportunity for premature judicial review of EPA's proposed cleanup procedures (see Pet. App. D11). As the court of

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[19] Indeed, there is ample evidence that PCBs have a variety of toxic effects on humans and other organisms, and are extremely persistent in the environment. See 47 Fed. Reg. 37342, 37344 (1982); *United States* v. *Commonwealth Edison Co.*, 620 F. Supp. 1404, 1406 (N.D. Ill. 1985) (summarizing effects). See also note 1, *supra*.

appeals noted (Pet. App. A16-A17), courts have consistently held that they have no jurisdiction under CERCLA to review the cleanup remedy prior to its enforcement; jurisdiction attaches only when the government sues the responsible parties for cleanup costs under Section 107. See *Wheaton Industries* v. *EPA,* 781 F.2d 354, 356 (3d Cir. 1986) (citing *Lone Pine Steering Committee* v. *EPA,* 777 F.2d 882 (3d Cir. 1985), cert. denied, No. 85-1389 (May 19, 1986)); *J.V. Peters & Co.* v. *EPA,* 767 F.2d 263, 265 (6th Cir. 1985); *Wagner Seed Co.* v. *Daggett,* No. 86-6032 (2d Cir. Sept. 10, 1986), slip op. 5673-5675.

Petitioner continues to seek pre-enforcement review, arguing that because EPA's remedy is an "unsound dredging project" that would cause it substantial injury, the district court should not have granted a voluntary dismissal (Pet. 17). This argument is premised on the suggestion (*id.* at 15-16) that the government's yet-to-be filed Section 107 cost recovery claim is essentially the same cause of action as the Section 106 injunctive relief claim, so that petitioner has been deprived of a ruling or trial on the cost recovery claim (Pet. 15-16).[20] This effort to link Section 107 to the dismissed complaint misreads the entire

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[20] Even if a Section 107 cost recovery claim did involve the same transaction as the dismissed Section 106 injunctive count, Rule 41(a)(2) does not prohibit the district court from dismissing some claims with prejudice, but other claims without prejudice. *United States* v. *Seckinger,* 397 U.S. 203, 205-206 (1970); Restatement (Second) of Judgments § 26(1)(b) (1982) (rules of res judicata are inapplicable where the "court in the first action has expressly reserved the plaintiff's right to maintain the second action"); see also *id.* § 26(1)(d). Thus, even if the district court had followed its initial approach of granting tentative dismissal with prejudice, but without prejudice to a subsequent cost recovery action, the court would have acted fully within its discretion under Rule 41(a)(2).

structure and purpose of CERCLA, which establishes alternative approaches that EPA may invoke to address hazardous waste contamination. A Section 106 action contemplates that the responsible parties will remedy the hazard, while Sections 104 and 107 authorize EPA cleanup and later cost recovery. Section 106 requires that the government demonstrate the possibility of an imminent and substantial endangerment. In contrast, EPA may act under Section 104 whenever there is a release or substantial threat of release of hazardous substances. Thus, even a dismissal with prejudice of the Section 106 action would not have affected the government's right to bring a subsequent Section 107 recovery action, since recovery of the costs of a Section 104 cleanup action by EPA would constitute an entirely separate claim from the dismissed injunctive relief claim. See, *e.g.*, *J. V. Peters & Co.* v. *EPA*, 767 F.2d at 264.

Petitioner's opportunity to challenge the remedy selected arises only if and when EPA determines to file a cost recovery action naming it as a responsible party. Petitioner "can suffer no deprivation until the adjudication of the section 107 litigation" (*J. V. Peters & Co.* v. *EPA*, 767 F.2d at 266); as the court of appeals found (Pet. App. A17-A18), petitioner may assert all defenses at that time, including any challenge to the cost-effectiveness of the remedy.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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